

REPUBLIC OF SOUTH AFRICA

PRESCRIPTION IN CIVIL AND CRIMINAL MATTERS (SEXUAL OFFENCES) AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 42854
of 22 November 2019)
(The English text is the official text of this Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 22—2019]

ISBN 978-1-4850-0624-4

No. of copies printed500

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Prescription Act, 1969, so as to extend the list of sexual offences in respect of which prescription does not commence to run under certain circumstances regarding a debt that is based on the alleged commission of any of those sexual offences; to amend the Criminal Procedure Act, 1977, so as to extend the list of sexual offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of the sexual offence; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 12 of Act 68 of 1969, as amended by section 1 of Act 11 of 1984, section 68 of Act 32 of 2007 and section 48 of Act 7 of 2013

1. Section 12 of the Prescription Act, 1969, is hereby amended by the substitution for subsection (4) of the following subsection: 5

“(4) (a) Prescription shall not commence to run in respect of a debt that is based on the alleged commission of—

(i) **[an alleged sexual offence as contemplated in sections 3, 4, 17, 18(2), 20(1), 23, 24(2) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,]** any sexual offence in terms of the common law or a statute; and 10

(ii) an **[alleged]** offence as provided for in sections 4, 5[,] and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013, 15

during the time in which the creditor is unable to institute proceedings because of his or her mental or **[psychological condition]** intellectual disability, disorder or incapacity.

(b) Paragraph (a)(i) is deemed to have come into operation on 27 April 1994.”.

Amendment of section 13 of Act 68 of 1969, as amended by section 11 of Act 139 of 1992 20

2. Section 13 of the Prescription Act, 1969, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) the creditor is a minor or is **[insane]** a person with a mental or intellectual disability, disorder or incapacity, or is a person under curatorship or is 25 prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or”.

Substitution of section 18 of Act 51 of 1977, as substituted by section 68 of Act 32 of 2007 and amended by section 48 of Act 7 of 2013 and section 8 of Act 8 of 2017

3. The following section is hereby substituted for section 18 of the Criminal Procedure Act, 1977:

“Prescription of right to institute prosecution

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18. (1) The right to institute a prosecution for any offence, other than [the offences of]—

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing;
- (eA) the—
 - (i) common law offence of bribery;
 - (ii) the offence referred to in section 1 of the Corruption Act, 1994 (Act No. 92 of 1994); or
 - (iii) offences referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
- (f) **[rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively]** any sexual offence in terms of the common law or statute;
- (g) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;
- (h) any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013);
- [(hA) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;**
- (i) **using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;**]
- (j) torture as contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

(2) Subsection (1)(f) is deemed to have come into operation on 27 April 1994.”.

Short title

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4. This Act is called the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act, 2019.

**MEMORANDUM ON THE OBJECTS OF THE PRESCRIPTION
IN CIVIL AND CRIMINAL MATTERS (SEXUAL OFFENCES)
AMENDMENT BILL, 2019**

1. PURPOSE OF BILL

- 1.1 The Constitutional Court, in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 ZACC 16 (“the Levenstein matter”), declared on 14 June 2018 that section 18 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), is inconsistent with the Constitution to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in section 18(f), (h) and (i) of the said Act, after the lapse of a period of 20 years from the time when the offence was committed. The Constitutional Court afforded Parliament 24 months to enact remedial legislation, that is before 14 June 2020.
- 1.2 The Criminal Procedure Amendment Bill, 2018, was introduced in Parliament on 30 May 2018, before the Constitutional Court delivered its judgment. The Department of Justice and Constitutional Development briefed the Portfolio Committee of Justice and Correctional Services on that Bill, but the Portfolio Committee did not invite interested parties to comment on the Bill.
- 1.3 On 16 January 2019, the Minister informed the Speaker that the applicants in the Levenstein matter have decided to challenge the constitutional validity of section 12(4) of the Prescription Act, 1969.
- 1.4 The Speaker was informed that the Criminal Procedure Amendment Bill, 2018, will be withdrawn and that a single Amendment Bill will be prepared to deal with proposed amendments to section 18 of the Criminal Procedure Act, 1977, and section 12 of the Prescription Act, 1969.

2. OBJECTS OF BILL

- 2.1 Section 12 of the Prescription Act, 1969 (Act No. 68 of 1969), regulates when prescription in civil matters begins to run. Section 12(4) provides that prescription does not commence to run in respect of a debt based on the commission of, among others, certain sexual offences during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.
- 2.2 **Clause 1** of the Bill aims to amend section 12(4) of the Prescription Act, 1969, in order to ensure that all sexual offences, whether they have been committed under common or statutory law, are included in that section.
- 2.3 Section 13 of the Prescription Act, 1969, deals with the delay of the completion of prescription in certain circumstances, for example where the creditor is a minor, is “insane” or is a person under curatorship.
- 2.4 **Clause 2** of the Bill aims to amend section 13 of the Prescription Act, 1969, to make provision for those cases where victims of sexual offences are in a position to institute proceedings, but then suffer relapses which prevent them from instituting proceedings for a period. Clause 2 aims to replace the term “insane” with the phrase “mental or intellectual disability, disorder or incapacity”.
- 2.5 Section 18 of the Criminal Procedure Act, 1977, regulates the prescription of the right to institute prosecutions after a period of 20 years has lapsed after alleged commission of certain offences. A prosecution may, in terms of section 18, only be instituted after a period of 20 years has lapsed after the alleged commission, among others, of—
 - (i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No 32 of 2007), respectively; and

- (ii) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

2.6 **Clause 3** of the Bill, among others, aims to give effect to the judgment of the Constitutional Court. Clause 3 aims to amend section 18 of the Criminal Procedure Act, 1977, to include reference to the offence of corruption. The clause also aims to ensure that all sexual offences, whether they have been committed under common or statutory law, are included in section 18 of the said Act.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department, with regard to the proposed amendment of the—

- (i) Prescription Act, 1969, received comments from the Centre for Child Law, Centre for Applied Legal Studies, Women's Legal Centre, Norton, Rose and Fulbright Attorneys, Ian Levitt Attorneys and Advocate M Mnyatheli; and
- (ii) Criminal Procedure Act, 1977, received comments from the Women's Legal Centre, the South African Police Service, a Clinical Psychologist, the organisation Shukumisa, Women and Men Against Child Abuse, the Legal Resources Centre, the Parliamentary Committee of the General Council of the Bar, the Centre for Applied Legal Studies, Lawyers Against Abuse, a feminist writer and researcher, Norton Rose and Fulbright Attorneys and the Commission for Gender Equality.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the classification of Bills. Therefore, a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*. The test entailed that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 6.4 In terms of section 76(3) of the Constitution a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The issue to be determined is whether the proposed amendments as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.6 As was pointed out above the Bill seeks to comply with the judgment of the Constitutional Court in which the Court declared section 18 of the Criminal Procedure Act, 1977, inconsistent with the Constitution and inconsistent to the extent that the section bars, in all circumstances, the right to institute a

prosecution for all sexual offences other than those listed in section 18(f), (h) and (i) of the Criminal Procedure Act, 1977, after the lapse of a period of 20 years from the time when the offence was committed.

- 6.7 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.8 In our view the provisions of the Bill do not, in substantial measure, fall within a functional areas listed in Schedule 4. The State Law Advisers and the Department are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.9 The State Law Advisers are further of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0624-4